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Supreme Court, U.S.
FILED
JUN 4 2001
CLERK

No. 00-1332

IN THE
SUPREME COURT OF THE UNITED STATES

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.,
LAW ENFORCEMENT ALLIANCE OF AMERICA, INC.,
JANE DOES I and II, and JOHN DOES I, III, and IV
Petitioners

v.

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

STEPHEN P. HALBROOK*
Richard E. Gardiner
10560 Main Street, Suite 404
Fairfax, Virginia 22030
(703) 352-7276
Attorneys for Petitioner

**Counsel of Record*

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ARGUMENT

1. Section 103(i)(1) of the Brady Act provides that no federal agency may "require that any record or portion thereof generated by the system established under this section be recorded at or transferred to" a government facility. The records thus protected are those "generated by the system," i.e., the records the dealer transmits to the NICS for an instant background check and which the regulation at issue directs shall be recorded as an "audit log."

Ignoring that § 103(i) addresses the records "generated by the system," Respondent asserts that "the provision prohibits the Attorney General from imposing additional reporting requirements on firearms dealers," which could be used to "establish a federal firearms registry." Br. 14. It is unclear why such "additional" records would be more susceptible to use for a registry than would the NICS-generated records kept by the government. But the argument is foreclosed by the fact that § 103(i) prohibits recordation of the records "generated by the system," the very records which compose the "audit log."

Respondent argues: "Section 103(i) does not prohibit the government or its agents from *recording* NICS records at a government facility."[1] Br. 13. The drafters beg to differ: "This legislation would prevent any Department, agency,

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[1] "The statute does not expressly preclude the agency from retaining NICS-generated records. . . . [T]he statute by its terms merely bars the government from *requiring others* to retain records." Br. 16 n.3. In other words, a statute which prohibits the government from retaining certain records is transformed into one which prohibits anyone but the government from retaining the records.

officer, or employee of the United States from compiling or recording any record obtained through the instantaneous check." 139 Cong. Rec. H2829 (May 8, 1991) (Armey-Staggers colloquy). Nothing about the word "require" prevents the prohibition on recordation from applying to the government, for the Attorney General through the regulation is "requir[ing] that any record or portion thereof generated by the system established under this section be recorded at" the NICS facility by NICS employees.

According to Respondent, the word "require" means that § 103(i) only bars "the government from requiring third parties, such as firearms dealers, from recording information at a federal or state government facility." Br. 8. This oddly presupposes that a dealer would have access to the government facility and is prohibited from recording information in the government computers.[2]

To be sure, § 103(i) prohibits the Attorney General from "requiring" anyone (whether government employee or dealer) to "transfer" NICS-generated records to a government facility -- with the obvious exception that information is transmitted by the dealer for the instant check and is destroyed on approval of

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[2] *National Rifle Ass'n v. Brady*, 914 F.2d 475, 483-84 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991), invalidated a BATF regulation about dealers with the words, "Congress could hardly have been more clear in its direction that 'no other recordkeeping shall be required.'" Respondent denies any parallel between this sweeping language and § 103(i), but then suggests that the substance is the same: "In both this case and that one, Congress was concerned with the information the agency might require *others* to record." Br. 16 n.3. Yet the statute in *NRA v. Brady* explicitly prohibited the agency from requiring other recordkeeping of dealers, while the statute here makes no reference to any third parties.

the transfer. The regulation violates this prohibition by requiring the dealer to transfer such records to a government facility for an extraneous purpose – the creation and maintenance of investigative files euphemistically termed an "audit log."

By prohibiting the Attorney General from "requiring" the transfer to or recordation of records at a government facility, the Act prohibits requiring either dealers *or* government employees to participate in the amassing of information on lawful transferees at a government facility. No amount of semantics about the word "require" can disguise the fact that the Attorney General, through the regulation, is "requiring" dealers to "transfer" records "generated by the system" to a government facility for use as an "audit log" for six months (not just for an instant check) and is "requiring" NICS employees to "record" the information in the audit log.

Respondent sees § 103(i) as "laden with ambiguity" because the Act includes exceptions. Br. 8, citing panel decision. These exceptions include records on disallowed transfers as well as the identification numbers and dates of allowed transfers. Yet the very listing of those exceptions demonstrates what is not excepted from the destruction requirement – records on the identity of approved transferees.

"A court must . . . interpret the statute 'as a symmetrical and coherent regulatory scheme,' . . . and 'fit, if possible, all parts into an harmonious whole . . . .'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S. Ct. 1291, 1300-01 (2000). Respondent argues that harmonization here would require "judicially transplanting exceptions" because

"those exceptions do not appear in Section 103(i)(1) itself." Br. 15. Yet Congress may enact a statute with a general rule in one section and exceptions in other sections.[3] Respondent's "alternative construction" which "eliminates the conflict" is nothing more than "appellate counsel's post hoc rationalizations," *Motor Vehicle Mfrs. Assn. v. State Farm Mutual*, 463 U.S. 29, 50 (1983).

Respondent otherwise makes policy arguments that should be made to Congress, not to this Court. Respondent claims that, without the "audit log," there is no way to guarantee that dealers are not requesting background checks for improper purposes. Br. 11-12. No supporter of the Brady Act suggested such a hypothesis. Instead, its proponents explained that if the government is allowed to keep NICS records, there is no way of guaranteeing that the government will not use the records other than for the determination of whether a transferee has a legal disability. Record destruction provides an institutional barrier to guarantee that the government makes no other use of the records. The Act relies on structural checks-and-balances, not on lofty declarations in regulations, to prevent governmental misuse of information.

Respondent gives reason after reason why the records are supposedly needed,[4] Br. 11-12, but the argument is really a

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[3] "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment.'" *Fourco Glass Co. v. Transmirra Corp.*, 353 U.S. 222, 228-29 (1957).

[4] For instance, supervisors must conduct spot checks to ensure that examiners have made the right decisions. This after-the-fact "audit"

list of excuses about why the Attorney General did not wish to operate NICS in the manner mandated by Congress. The criminal code punishes the making of false statements, which Congress intended to be ferreted out using traditional law enforcement methods.[5] Nullifying statutory provisions intended to protect privacy under the plea of "necessity" is no more legitimate than are Fourth Amendment violations committed in the purported interest of law enforcement.

2. Section 103(i)(2) provides that no federal agency shall "use the system established under this section to establish any system for the registration of firearms, firearm owners, or firearm transactions, except with respect to" persons who are prohibited by law from receiving firearms. The character of the "audit log" as a registration system according to ordinary linguistic usage is not ameliorated by the regulation's Orwellian self-declaration that the "audit log" registry of firearm owners may not be used to establish a registry of firearm owners. Br. 17, quoting 28 C.F.R. § 25.9(b)(2).

The statute prohibits registration of "firearm owners, or firearm transactions," but Respondent claims no violation exists

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allows mistakes to be made and firearms to be transferred unlawfully. Spot checks conducted while the examiner is making the decision would prevent such mistakes and remove any supposed need for an "audit log."

[5] While chanting the mantra "audit," the actual use of the registry is said to be the enforcement of Gun Control Act prohibitions on false statements. However, Congress did not intend that the FBI use NICS records to investigate already-approved transferees, and the FBI has no lawful power to inspect dealer records, *see United States v. Biswell*, 406 U.S. 311, 315 (1972) ("the legality of the search depends . . . on the authority of a valid statute").

because addresses are not required. Br. 17. Surely "firearm owners" are identified by name, sex, race, date of birth, and State of residence, all of which NICS requires, together with permissible requests of one's Social Security number, military number, height, weight, eye and hair color, and place of birth. 28 C.F.R. § 25.7. The fact that the identities of all firearm owners or transactions are not permanently kept does not mean that the Log, during the time it is maintained, is not "a record or list of names . . . kept by an official appointed to do so." *Webster's New World Dictionary* 1130 (1988) (defining "register").[6]

3. Section 922(t)(2), 18 U.S.C., provides that if receipt of a firearm would not violate the law, the system shall:

> (A) *assign* a unique identification number to the transfer;
>
> (B) *provide* the licensee with the number; and
>
> (C) *destroy* all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer. (Emphasis added.)

Respondent relies on lack of the word "immediate,"[7] Br.

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[6] Respondent writes that "unlike the machine gun registry, the audit log may be used only for" specified purposes. Br. 17. Actually, machine gun registration records are tax records strictly protected from disclosure by the tax privacy provisions of 26 U.S.C. § 6103.

[7] "Given the straightforward statutory command, there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S.

18-19, yet ignores the unqualified nature of the command to "destroy" and the irreconcilability thereof with its antonym, "maintain." *See* 28 C.F.R. § 25.9(b) ("the FBI will maintain an automated NICS Audit Log"). Once the transferee passes the instant check, Congress delegated no authority to the Attorney General to do anything with the records other than to "destroy" them.

The Act's Interim Provision granted a 20-day grace period for destruction of the background-check records by local law enforcement. 18 U.S.C. § 922(s)(6)(B)(i). Respondent argues that "Congress knew how to include express deadlines," Br. 19-20, but ignores that, without an explicit grace period, the term "destroy" on its face negates any act of retention.

4. Petitioners do not argue, as Respondent suggests, that *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is inapplicable. Br. 20-21. *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000), refined the *Chevron* test to explain that, even in the absence of statutory clarity, the courts should not recognize an implied delegation of power to an agency where the issue is of great public magnitude. "Congress could not have intended to

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1, 6 (1997). Even if it is considered, no one contradicted Senator Craig's explanation of the Senate version, which did not include the word "immediate," thus: "It is a matter of law that they [the records] should not stand once the background check is done, so that there not be a fear that somebody were compiling a master list of guns and gunowners." 139 Cong. Rec. S16328 (Nov. 19, 1993). "As a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute." *Federal Energy Administration v. Algonquin Sng, Inc.*, 426 U.S. 548, 564 (1976).

delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[8] *Id.* at 1315.

Again and again, decade after decade, Congress has rejected the concept that the government keep any lists of lawful owners of firearms. The privacy provisions at issue here join a long line of other provisions with the same fundamental objective. Like tobacco, the firearms issue "has its own unique political history," and "we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny . . . this power."[9] *Id.*

The Brady Act was an historic compromise in which law-abiding firearm owners would submit to a background check in exchange for the promise that the government would not keep any records on their identities.[10] The very suggestion

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[8] "A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration." *Id.* at 1314, quoting Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986).

[9] Respondent states that the court of appeals accorded the agency no deference on most issues, Br. 22 n.5, but the court stated: "[B]ecause the statute nowhere identifies precisely whose privacy interests are protected, we defer to the Attorney General's interpretation . . . ." App. 24a.

[10] Enactment of § 103(i) guaranteed that the Brady bill would not "authorize the Federal Government to compile a database of firearm purchase using information collected through the instantaneous computer check." 135 Cong. Rec. H2828-29 (May 8, 1991) (Armey-Staggers colloquy). "The amendment specifically prohibits keeping any records about lawful sales." *Id.* at S8934 (June 27, 1991) (statement of Senator Stevens). "This instant check system will be used by licensed dealers to

that the government could keep records on firearm owners for such duration as the Attorney General pleased would have wrecked passage of the Act. Yet Respondent embraces the "implicit delegation" argument and finds this to be a case where "Congress declines to speak to the question and instead delegates to an agency the responsibility of filling the statutory gap . . . ." Br. 22-23 n.6.

However, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 121 S. Ct. 903, 909-10 (2001). There, this Court "refused to find implicit in ambiguous sections of the CAA [Clean Air Act] an authorization to consider costs that has elsewhere, and so often, been expressly granted." 121 S. Ct. at 909-10. Here, the Act explicitly prohibits retaining records on lawful transferees and expressly grants the power to retain records on denied transferees. And here, as in *American Trucking*, "the agency's interpretation goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear." *Id.* at 916-17. An agency "may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Id.* at 918-19.

Like *Brown & Williamson*, this Court's decision in *American Trucking* disdains implied or cryptic delegations of power involving issues of great significance:

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check the eligibility of purchasers of all firearms and no records of legitimate purchasers may be kept." *Id.* at S9080 (June 28, 1991) (statement of Senator Thurmond).

> We find it implausible that Congress would give to the EPA through these modest words the power to determine whether implementation costs should moderate national air quality standards. . . . "The implausibility of Congress's leaving a highly significant issue unaddressed (and thus 'delegating' its resolution to the administering agency) is assuredly one of the factors to be considered in determining whether there is ambiguity."

Id. at 910, quoting *Christensen v. Harris County*, 529 U.S. 576, 590, n. (2000) (Scalia, J., concurring).

The decision of the court below is in conflict with the above fundamental principles. Granting this petition for certiorari would give this Court an opportunity to develop further its jurisprudence concerning the presumption against "cryptic delegations" as well as to correct a decision that adversely affects the privacy rights of millions of Americans.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

STEPHEN P. HALBROOK*
Richard E. Gardiner
10560 Main Street, Suite 404
Fairfax, Virginia 22030
(703) 352-7276
Attorneys for Petitioners

*Counsel of Record